

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	CR-04-43-B-W
	)	
CLIFTON DAVIS, et al.,	)	
	)	
Defendants.	)	

**ORDER AFFIRMING THE  
RECOMMENDED DECISIONS OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed three Recommended Decisions with the Court. No objections having been filed to the Magistrate Judge's Recommended Decisions filed January 6, 2005 (Docket No. 216), and January 7, 2005 (Docket No. 222), those Recommended Decisions are accepted.

The Magistrate Judge also filed with the Court on January 6, 2005 another Recommended Decision (Docket No. 214) on Defendants' Motions to Dismiss Superseding Indictment for Violations of the Speedy Trial Act. Defendant Kelvin DeLoatch filed his objections to the Recommended Decision on January 20, 2005, and Defendant Chelsea Andrews filed her objections to the Recommended Decision on February 3, 2005.<sup>1</sup> Defendant Clifton Davis did not object to the Recommended Decision and the January 6, 2005 Recommended Decision is accepted as to Defendant Davis.

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<sup>1</sup> Defendants DeLoatch and Andrews requested oral argument before this Court. Magistrate Judge Kravchuk held an extensive motion hearing on January 5, 2005 and this Court has reviewed the transcript of that hearing, including oral argument on the same issues. To avoid delay in the disposition of this motion, in view of the availability of that transcript and written argument by counsel, and in light of the issues, this Court DENIES the Defendants' requests for oral argument.

Magistrate Judge Kravchuk issued the January 6, 2005 Recommended Decision before the United States Supreme Court decided *Booker v. United States*, \_\_U.S. \_\_, 125 S. Ct. 738 (2005). This Order addresses in part the implications of *Booker* on the Motion to Dismiss. The Superseding Indictment differed from the original Indictment in two salient respects: 1) it added seven separate sentencing allegations, setting forth the drug quantities it alleged each defendant was responsible for; and, 2) it amended Count One to change the penalty allegation from 21 U.S.C. § 841(a)(1)(C) to 21 U.S.C. § 841(a)(1)(B).<sup>2</sup> This Court has previously concluded *Booker* renders separate sentencing allegations, like those found in the Superseding Indictment, surplusage. *United States v. Cormier*, 226 F.R.D. 23 (D. Me. 2005).

This leaves the question of whether the new penalty allegation merely gilds the original charge in a manner questioned by *United States v. Bailey*, 111 F.3d 1229, 1236 (5th Cir. 1997). This Court agrees with the Magistrate Judge that the Superseding Indictment here does not gild the original Indictment. First, when issued, the Superseding Indictment did not run afoul of *Bailey* for the reasons Judge Hornby articulated in *United States v. Brown*, 335 F. Supp. 2d 146, 148 (D. Me. 2004). Second, the addition of the higher penalty provision under 21 U.S.C. § 841(b)(1)(B) informs the defendants of “the nature and cause of the accusation” against them. U.S. Const. Amend. VI; *see* Fed. R. Crim. P. 7(c)(1) (“The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged....”); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (“Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”).

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<sup>2</sup> As Magistrate Judge Kravchuk pointed out, the Superseding Indictment also added another defendant, William Aherndt, but the parties did not argue that this reset the Speedy Trial clock. *Recommended Decision* at 4 n.2.

Third, if the insertion of the enhanced penalty allegation in Count One works a change in the original Indictment, the Superseding Indictment passes muster under *United States v. Hemmings*, 258 F.3d 587, 591-92 (7th Cir. 2001) (holding superseding indictments filed longer than thirty days after an arrest which add charges to those contained in the original indictment do not violate the Speedy Trial Act), but if the enhanced penalty allegation only restates and clarifies the original charge, it also passes muster under *United States v. Mitchell*, 723 F.2d 1040, 1044-45 (1st Cir. 1983) (holding a superseding indictment containing charges identical to those in the original indictment and based on identical facts is not subject to the thirty-day limit). *Mitchell* also points out another factor: whether the Superseding Indictment alters “the starting time for the seventy-day indictment-to-trial requirements of section 3161(c)(1).” *Id.* at 1045. Here, the Magistrate Judge noted that the Government and at least Mr. DeLoatch agreed that “the Speedy Trial clock, vis-a-vis the time to trial in this case, should run from the original indictment for all defendants....” *Recommended Decision* at 4 n.2.

Finally, the Superseding Indictment places the defendants on notice they have been charged with a heightened statutory penalty; this may constitute an element of the offense. *See United States v. Perez*, 338 F. Supp. 2d 154, 155-56 (D. Me. 2004). Under the “Blockburger” test described in *Bailey*, a superseding indictment that adds an element of the offense would not, in any event, violate § 3161(b). *Bailey*, 111 F.3d at 1236-37. Placing the defendants on notice that the drug quantity in their case could subject them to a maximum of forty years and a minimum of five years in jail, instead of a maximum of twenty and no minimum, is not merely an embellishment or “unnecessary ornamentation” under *Bailey*. *Bailey*, 111 F.3d at 1236.

I have reviewed and considered the Magistrate Judge's Recommended Decision (Docket No. 214), together with the entire record; I have made a de novo determination of all matters

adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision and the reasons set forth herein.

1. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge (Docket No. 214) is hereby AFFIRMED.
2. It is further ORDERED that Defendants' Motions to Dismiss (Docket No.'s 183, 185 and 191) Superseding Indictment are DENIED.
3. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge (Docket No. 216) is hereby AFFIRMED.
3. It is further ORDERED that Defendants' Motions to Suppress (Docket No.'s 168 and 182) are DEEMED WITHDRAWN, subject to Defendants' right to object to the introduction of an address book or any other property retrieved from the subject vehicle after it was repossessed and removed from police custody. The issues pertaining to the fingerprint evidence taken from the "no cover" DVD are moot.
4. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge (Docket No. 222) is hereby AFFIRMED.
5. It is further ORDERED that Defendant Andrews' Motion to Suppress (Docket No. 145) is DENIED.

SO ORDERED.

/s/John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
UNITED STATES DISTRICT JUDGE

Dated this 7th day of March, 2005.

**Defendant**

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*also known as*  
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**Defendant**

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**Defendant**

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